Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
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Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

REPLY COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA AND FREE PRESS

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SUMMARY

In these reply comments, we demonstrate the falsity of industry commenters' lament that the wholesale elimination of existing media ownership limits is necessary to ensure the very survival of broadcast stations and daily newspapers. The Internet and other technological innovations, far from jeopardizing the viability of big media firms, are instead rapidly evolving into additional outlets for the distribution of lowest common-denominator, homogenized, repackaged and repurposed content to the public. We show that the industry's claims that permitting further consolidation will yield dividends for the public in terms of better and more diverse programming are unproven at best and -- given the industry track record – more likely disingenuous.

The measures the Commission has already taken to reduce media ownership regulation have not only utterly failed to produce any demonstrable benefits, but have also led to the formation of a handful of giant horizontally- and vertically-integrated media firms, capable of exercising near-total control over the news, information and entertainment programming available to viewers. The media industry is highly concentrated at both the national and local level. These megafirms and their smaller competitors, the regional and national chains, have engaged in an acquisition frenzy. The result has been that the prices for broadcast properties, even in smaller markets, have escalated rapidly, often well beyond the reach of potential new entrants.

Given the fundamental importance of independent local news gathering done by local daily newspapers for the purpose of competing with television broadcasters, competition, diversity and democracy itself are all in jeopardy if a dominant local newspaper is acquired by one of the major local television broadcasters. The combination would be a local news powerhouse, well positioned to define what stories are covered, what scandals are investigated, what points of view are repeated most often when important community decisions are made and officials

elected. Since most local newspaper markets are either monopolies or have only one dominant daily paper, the potential competitors would not have an opportunity to merge with another local newspaper with comparable circulation and influence, would be unable to replicate the enormous up-front investment in local news gathering and would therefore not be a meaningful competitor in the local news market. Newspaper-television combinations deny communities the checks and balances that naturally occur when competing reporters strive to deliver the "scoop" for their paper or station, and the flow of diverse opinion and commentary that informs the local electorate and sustains meaningful civic debate in our society is measurably slowed.

For much of the past quarter-century, the Commission has played the role of acolyte in the temple of broadcast deregulation. This massive structure was erected by the big media conglomerates, which regularly profess their faith in the invisible hand of the unfettered marketplace and worship at the altar of ever-increasing shareholder dividends. The guiding principles are fourfold, and inscribed on the massive pillars that support the temple. The first of these principles is that deregulation is essential to the very survival of the traditional mass media. Second, the faithful aver that the necessity for any cross-ownership or multiple ownership regulation has been eliminated with the rise of the Internet. Third, they are committed to good works: a deregulated media marketplace will deliver many benefits to the public. The fourth principle is that deregulation will not cause harm.

It is well past time for the Commission to recognize that the temple of broadcast deregulation – outwardly a noble and majestic edifice – is a mere façade. Like the superficially passable replicas built on Hollywood back lots in the golden age of cinema, it is fundamentally unsound and subject to collapse at any moment.

The pillars require empirical grounding, not just blind faith or theory, to pass judicial muster. Three times in the past decade, the Commission's media ownership rules have been presented to the courts on appeal, and each time the Commission's efforts have been rejected. The research attached to these comments, the studies filed in the initial round in this proceeding, and the substantial body of evidence we presented in the previous ownership proceeding, all demonstrate that the pillars are pure ideology, lacking substantial grounding in legal or economic reality.

The voices of Congress, the courts and the public are calling out in unison for the Commission to cease its worship at the temple of broadcast deregulation and to begin a journey that will lead to a richer and more diverse media environment.

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REPLY COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA AND FREE PRESS

Consumers Union, Consumer Federation of America and Free Press (collectively, "CU et al."), respectfully submit these Reply Comments. These Reply Comments respond to the initial comments submitted on October 23, 2006 in response to the Commission's Further Notice of Proposed Rule Making, FCC 06-93 ("Notice" or "NPRM"), released July 24, 2006.

Our initial comments, filed on October 23, 2006, included a compendium of more than thirty economic, legal and other studies (the "*Compendium*"). Our economic analysis showed that even in the largest cities in America, the television market is already highly concentrated, and that permitting further mergers would raise concentration levels well above thresholds that would trigger antitrust oversight in any marketplace. We explained that more stringent safeguards against excessive concentration are necessary given the unique role that mass media (particularly television and newspapers) play in our civic discourse. Both Congress and the courts have recognized that there is an essential connection between democracy and a diverse, local, competitive and independent media. That connection, which provided the impetus for the adoption of the Commission's media ownership rules, deserves to be explicitly acknowledged once again by this Commission and accurately reflected in the rules to be adopted in this proceeding. We urged the Commission to adopt reasonable media ownership limits that will preserve the public's access to local news and information, encourage more minority ownership of media outlets, and ensure that diverse viewpoints will be heard.

Our reply comments are divided into three major sections. In the first of these sections, we refute the industry commenters' three principal legal arguments, namely: that media ownership rules are unconstitutional; that the "scarcity rationale" underlying media ownership rules is no longer viable; and that Section 202(h) of the Act creates a presumption in favor of repeal. The second section revisits issues related to market structure. The final section responds to four claims presented by industry commenters.

DISCUSSION

I. THE CHALLENGE TO THE PUBLIC INTEREST

A. *Attacks on First Amendment Basis for Public Policy*

Several industry commenters, including Bonneville[1] and Fox[2] challenge the constitutionality of the Commission's Media Ownership Rules. The broadcasters and newspaper publishers who advocate repeal or relaxation of these rules allege that the rules run afoul of the First

[1] Appendix A contains a list of the short form citations to parties' initial comments filed October 23, 2006 in the Commission's Media Ownership proceeding. Short form citations are used throughout these reply comments.
[2] Fox at 23.

Amendment guarantees of freedom of speech and the press and the Fifth Amendment's equal protection clause. In our initial comments, CU et al. explained in considerable detail how a broad, positive view of the First Amendment, as contrasted with the narrow, negative view espoused by the industry commenters, best serves the public interest.[3] Nevertheless, we will here respond briefly to each of the industry commenters' contentions.

1. Scarcity/Abundance. Bonneville, to cite one example, asserts that the newspaper/television cross-ownership rule is unconstitutional, because the scarcity of outlets, the rationale which led the Supreme Court to uphold the rule previously, no longer prevails. Bonneville asserts that "subsequent technological developments have eroded the factual underpinnings of the scarcity rationale."[4]

Media General makes a similar argument, citing a Media Bureau Staff Report. Media General cites a March 2005 Media Bureau Staff Report entitled "The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed" ("Scarcity Staff Report"). That report reflects only the opinions of its author, as the preface clearly states: "The views and professional opinions expressed in any Media Bureau staff research paper are those of the author, or authors, and do not necessarily reflect the views of the Media Bureau, Commissioners, or any other Commission staff member or organizational unit within the Federal Communications Commission."

Although the author of the "Scarcity Staff Report" underscores what is described as "an explosion in the number of distribution networks and channels" including cable and DBS, as justifying elimination of the scarcity rationale, the authors of other Commission staff papers believe

[3] "Communications and First Amendment jurisprudence squarely and for decades has supported the proposition that acceptable media policy is about more than economics and requires concern for preservation of a vigorous debate that includes the presentation of a diversity of views on a broad array of issues." CU et al. at 7 (internal citations omitted).
[4] Bonneville at 12.

a more nuanced view of the market is appropriate. *See, e.g.,* the recently released undated paper entitled "Research on the United States Multichannel Video Industry at the Federal Communications Commission" by Duwadi and Wise,[5] which concludes, among other things, that: '[t]he dynamics in the industry, and the nature of competition, will not be understood by reference to simple factors, such as the presence or extent of rivals."

Media General makes two additional claims regarding the scarcity rationale. The first claim is that the scarcity rationale has been repudiated, declared obsolete or at least called into question on various occasions, either by the full Commission or by individual Commissioners. The second is that the action of Congress, in directing the Commission to award initial broadcast licenses via competitive bidding, has dramatically curtailed the Commission's oversight role, thereby eliminating "any principled foundation for the 'scarcity doctrine'."[6]

The industry's argument is without merit. Though the Commission has repeatedly reviewed and debated the scarcity rationale over the past several decades, there is far from any consensus within the Commission, the Congress or the Courts that the scarcity rationale lacks foundation. In fact, the contrary is true. When called upon to vote, the Commissioners have generally been divided, if not deadlocked. For virtually every "scarcity is dead" statement by some members of the Commission, such as the 1998 Joint Statement of Commissioners Furchtgott-Roth & Powell, cited by Media General at p. 82 and n. 218, there is a "scarcity lives" statement by other Commissioners, such as the 1998 Joint Statement of Commissioners Ness & Tristani in the same proceeding.[7] More to the point, thirteen years after the Commission adopted the decision cited by Media General, in which it concluded that the scarcity rationale developed in *Red*

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[5] These papers, and others, are available online at http://www.fcc.gov/ownership/additional.html.
[6] Media General at 75-77.
[7] The Ness/Tristani Joint Statement was treated as the final, reviewable order of the Commission on appeal in RTNDA v. FCC, 184 F.3d 872 (D.C. Cir.1999).

Lion and successive cases "had outlived its usefulness"[8] the Commission stated that

> it is appropriate to make clear that the dicta in *Syracuse Peace Council* regarding the appropriate level of First Amendment scrutiny has been rejected by Congress, this Commission, and the courts.

Repeal or Modification of the Personal Attack and Political Editorial Rules, Order and Request to Update Record, MM Docket No. 83-484, FCC 00-360, Adopted October 3, 2000, at para. 17.

> The standard of *Red Lion*…was not based on the absolute number of media outlets, but on the fact that the spectrum is a public resource and "there are substantially more individuals who want to broadcast than there are frequencies to allocate.

Id. at para. 18

As the *Prometheus* court observed, "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce."[9]

The assertion that the scarcity rationale no longer applies is belied by the great lengths to which the holders of broadcast licenses go to advocate, defend and try to expand those laws and regulations that protect the bundle of rights (ranging from interference protection[10] to satellite and cable system carriage[11]) associated with these valuable properties. As we will detail later in these reply comments, the financial markets recognize the value of these licenses by purchasing stations at healthy multiples. Barely two weeks ago, the New York Times Company announced that it had agreed to sell its nine television stations to a private equity firm for $575 million,[12] or

[8] Media General at 70-71, citing the Commission's 1987 decision in *Syracuse Peace Council,* 2 FCC Rcd. 5043, 5052-5053 (1987).

[9] *Prometheus Radio Project v. FCC,* 373 F.3d 372, 402 (3rd Cir.2004), citing *Ruggiero v. FCC,* 278 F.3d 1323, 1325 (D.C.Cir.2002), *rev'd en banc*, 373 F.3d 239 (D.C. Cir. 2004), *cert. denied* 124 S.Ct. 62 (2003).

[10] An example of broadcast industry actions is described in the *Ruggiero* decision cited in the immediately preceding footnote. In the words of the D.C. Circuit majority, "Less than a year after the [low power radio] rules' promulgation, Congress, responding to broadcast industry lobbying…direct[ed] the Commission to amend the low-power rules to limit the frequencies available for low-power stations, thus reducing the risk of interference to existing stations." 278 F.3d at 1326.

[11] *See, e.g.,* 47 U.S.C. §614 and §325, implemented by 47 C.F.R. §§76.64 and 76.66 (collectively referred to as "must carry" and "retransmission consent").

[12] Louise Story, "Times Co. Agrees to Sell TV Stations to Equity Firm," *New York Times,* January 5, 2007, C-5.

about 14 times cash flow. As AWRT explains in its initial comments, one of the adverse effects of prior relaxation of media ownership limits has been a substantial increase in the prices paid for broadcast properties in smaller markets, putting them beyond the reach of new entrants.[13] This increase in valuation suggests that the resource remains scarce and is increasingly inaccessible.

Any broadcaster unwilling to continue to operate under the allegedly onerous constraints of the Commission's rules can either relinquish their license or follow the example of the New York Times Company and offer their broadcast properties for sale. We are not aware of any broadcast licensee who has voluntarily turned in a license so that it can be reissued to another willing operator, although there is nothing in the rules to prevent a licensee from doing so. The fact that few, if any, broadcast licenses are voluntarily returned to the FCC is further evidence of their value.

As to Congress' view of the scarcity doctrine, evidence suggests that Congress not only continues to view broadcast spectrum as a scarce resource, it has taken action to ensure that national limits on ownership cannot be relaxed by the Commission by codifying in 2004 the maximum national audience and single broadcaster may reach. While Congress' did curtail the Commission's oversight authority, rather than reflecting a view that the scarcity doctrine lack foundation, Congress' move reflects skepticism that the Commission will continue to protect the public interest by recognizing and enforcing the doctrine.

Broadcast licenses remain scarce and highly valuable. The scarcity of outlets rationale for the newspaper/television cross-ownership rule remains as viable as ever.

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[13] *See, e.g.,* AWRT at 5-6: "Station pricing is a very real issue for small businesses seeking to purchase a station because consolidation has permitted group owners to purchase a high percentage of the attractive stations, often times at very high multiples. This is true even in smaller, more rural markets. Consequently, many current owners of smaller stations are pricing their stations well beyond the fair market value of the station regardless of whether the market or geographic region can support such pricing."

2. Ownership. Bonneville asserts that the newspaper/broadcast cross-ownership rule is unconstitutional under the First Amendment and also violates the Fifth Amendment's equal protection clause by imposing restrictions on newspaper publishers that are more stringent than those imposed on owners of other mass media.[14] Fox alleges that the Commission's rules raise "troubling First Amendment questions" because they treat television station owners differently than owners of other video competitors.[15] Fox claims that singling out local television stations without considering cable networks and Internet content constitutes a First Amendment violation, in that the "government should not preclude one speaker from acquiring additional outlets based on the popularity of the speaker's content."[16]

Fox and Bonneville have it backwards. It is the public's interest in access to information from the widest possible variety of sources that is paramount in First Amendment analysis. In our initial comments, we demonstrated that local newspapers and broadcast television are relied upon most heavily for local news and public affairs programming,[17] and that "ownership matters." Reply Study 8 reinforces these conclusions. Ownership matters because the views of the owners of media outlets are reflected in the selection of programming and the editorial content, even where cross-owned or commonly owned media outlets are separately managed.[18] Viewed from the proper perspective – that of the audience, rather than that of the speaker – the Commission's media ownership rules advance rather than run afoul of the values of the First Amendment. In any given local market, an increase in media concentration diminishes the availability

[14] Bonneville at 11-12.
[15] Fox at 23. The "other video competitors" cited by Fox are cable and the Internet (described as "significant competitors"). Fox also mentions video content proliferation on mobile devices as a phenomenon that will further undermine the TV-centric assumption underlying the Commission's rules. Id.
[16] Fox at 23.
[17] CU et al. at 10-11 and accompanying studies.
[18] CU et al. at 15-16 and accompanying studies.

of information from diverse and antagonistic sources.[19] As aptly stated by one commenter:

> As the Supreme Court concluded in Associated Press v United States, 326 U.S. 1, 20 (1945) viewpoint diversity in our media is important because "[i]t advances the values of the First Amendment," and rests on the assumption that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Thus, "promoting the widespread dissemination of information from a multiplicity of sources is a government interest that is not only important, but is of the 'highest order' and is unrelated to the suppression of free speech.

AFL-CIO and DPE at 5-6 (internal citations omitted).

Given the fundamental importance of independent local news gathering done by local daily newspapers for the purpose of competing with television broadcasters, competition, diversity and democracy itself are all in jeopardy if a dominant local newspaper is acquired by one of the major local television broadcasters. The combination would be a local news powerhouse, well positioned to define what stories are covered, what scandals are investigated, what points of view are repeated most often when important community decisions are made and officials elected. Since most local newspaper markets are either monopolies or have only one dominant daily paper, the potential competitors would not have an opportunity to merge with another local newspaper with comparable circulation and influence, would be unable to replicate the enormous up-front investment in local news gathering and would therefore not be a meaningful competitor in the local news market. Newspaper-television combinations deny communities the checks and balances that naturally occur when competing reporters strive to deliver the "scoop" for their paper or station, and the flow of diverse opinion and commentary that informs the local electorate and sustains meaningful civic debate in our society is measurably slowed.

[19] See, e.g., AFL-CIO and DPE at 5-6: "As the Supreme Court concluded in Associated Press v United States, 326 U.S. 1, 20 (1945) viewpoint diversity in our media is important because "[i]t advances the values of the First Amendment," and rests on the assumption that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Thus, "promoting the widespread dissemination of information from a multiplicity of sources is a government interest that is not only important, but is of the 'highest order' and is unrelated to the suppression of free speech."

3. Licensed vs. Unlicensed. Some industry commenters[20] argue that content delivered via unlicensed spectrum, including that used according to 802.11 standards or WiFi, should be considered as competing with licensed radio and television broadcast services. Although WiFi has been deployed in wide-area applications in a number of situations, the fact that the spectrum is shared with other users and wholly without interference protection suggests that any such comparison is fundamentally flawed. If WiFi were fully substitutable for licensed spectrum, or if licensed spectrum (of either the broadcast or mobile variety) were not scarce, then licensed spectrum would not command its current high prices in either the "primary market" (the Commission's spectrum auctions) or the "secondary market" (license assignments and transfers).

Broadcasters, many of whom were awarded their licenses a half-century ago via comparative hearing or other non-market mechanisms, have become so accustomed to their privileged position that they have forgotten the bargain made with the public. A particularly glaring example of this selective amnesia is found in the comments of CBS. CBS refers to the "proud tradition of service" and the importance of preserving a broadcasting system "that is both free of charge to the consumer and universally available."[21] But the broadcasters' right to use the public's spectrum (often free, or nearly free, for decades) carries with it the obligation to operate in the public interest. The very government regulations which are characterized as hobbling broadcast licensees, but not their competitors, are the result of a bargain struck decades ago. As the Supreme Court has stated

> [a] licensed broadcaster is "granted the free and exclusive use of a valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.

CBS v. FCC, 453 U.S. 367, 395 (1981) (quoting *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

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[20] ARSO at 5, Sinclair at 14, Media General (vol. 1) at 82.
[21] CBS at 12.

The media ownership rules should be repealed or relaxed only if there is clear and convincing evidence that they no longer serve the public interest – a burden of persuasion that the broadcasters have not met.

B. Section 202(h)

Hearst[22] and the NAB[23] characterize Section 202(h), under which the Commission conducts periodic reviews of its regulations, including this proceeding, as "deregulatory." It is true that the Third Circuit in *Prometheus* recognized that 202(h) was enacted as part of a package of deregulatory amendments to the Communications Act. However, contrary to Hearst's contention,[24] Section 202(h) carries no presumption in favor of deregulation. The most recent effort to load the dice in favor of deregulation was soundly rejected by the *Prometheus* Court, which said that the Commission had been misguided by the D.C. Circuit's characterization of the effect of Section 202(h) in the *Fox* and *Sinclair* cases.[25]

It is also true, as the NAB contends,[26] that the Commission is obligated to repeal or modify a regulation if, following a periodic review, it determines that the regulation no longer remains necessary in the public interest. But nothing in section 202(h) excuses the Commission from meeting its obligations under the Administrative Procedure Act, 551 U.S.C. §§ 551 et seq. (the "APA"), a point which the *Prometheus* Court underscored in its ruling. It is the public interest, not the interest of particular participants in the local media marketplace[27] that must be the

[22] Hearst at 2-3.
[23] NAB at 2, 4, 5, 102, 119, 123.
[24] Hearst at 2.
[25] *Prometheus Radio Project v. FCC*, 373 F.3d 372, at 394-395 (3rd Cir. 2004); *see also Cellco P'ship v. FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004).
[26] NAB at 5.
[27] Hearst, at 2, asserts that the Commission must "demonstrate that its current ownership rules are necessary to protect competition in the local media marketplace or modify its rules to accommodate the competitive conditions that currently exist." As the *Prometheus* Court made abundantly clear, the test is whether the rule remains useful in the pubic interest.

Commission's focus.

The "public interest" standard is broad and flexible, and if the Commission provides a reasoned analysis supporting whatever decision it makes with respect to a particular rule – retain, repeal, or modify to make more or less stringent – its decision is entitled to judicial deference.[28] Public interest considerations different from those that provided the impetus for adoption of a rule may justify its retention. For example, the 1996 amendments to the Communications Act of 1934, in addition for providing for periodic review of Commission regulations broadened the Commission's mandate to make communications available to all Americans to add "without discrimination on the basis of race, color, religion, national origin, or sex" to the statement of purposes for which the Commission was established (47 U.S.C. 151). Accordingly, if the Commission, after a periodic review of its media ownership rules, determines that retention of multiple ownership or cross-ownership limits is necessary to provide access to communications services "without discrimination" those limits should be maintained or made more stringent.[29]

This conclusion necessarily follows from the remand by the Third Circuit in *Prometheus.* The court rebuked the Commission for failing to consider the impact of its ownership rules on new entrants, including women and minorities. We will discuss the impact that changes in the media ownership rules have had on various communities and groups in later sections of these reply comments.

[28] *Prometheus Radio Project*, 373 F. 3d at 395.
[29] UCC at 23.

II. REVISITING ISSUES RELATED TO MARKET STRUCTURE

A. Concentration Analysis

In our initial comments, at pp. 5-6 we recalled that the *Prometheus* Court acknowledged that concentration analysis is a legitimate "starting point" for the Commission's development of media ownership rules. We also observed that the *Prometheus* Court cautioned that even though both the Commission and the two federal antitrust enforcement agencies employ market analysis as a tool, there are important differences in the objectives for which market analysis is employed. In other words, there are important differences between markets as defined for antitrust purposes and the "marketplace of ideas" that the Commission is obligated to protect through ownership rules that serve the crucial "public goals of diversity, competition, and localism."[30] Later in our initial comments, at Study 23, we presented a comparison of the levels of media market concentration in ten markets applying two different methodologies. The comparison covered the ten markets the Commission reviewed in detail in its *2002 Biennial Review Order*. The results of the comparison were startling. The Commission, applying the Diversity Index with its flawed assumption of equal market shares within media types, found that only one of ten markets was above the concentrated threshold and that none were above the highly concentrated threshold. In contrast, when we assigned weights based on industry market share data and the results of a national random sample survey of consumer media usage, we found that *every* market was above the concentrated threshold and fully eight of the ten above the highly concentrated threshold.

In several of the studies in the *Compendium*, we documented the harm to localism and diversity arising out of concentration of ownership within local media markets, consolidation of media into national chains and conglomeration across media types. As described in our initial comments at 15, and documented in Studies 4, 6, 10, 15, 16 and 18 in the *Compendium*, the per-

[30] *Prometheus,* 373 F.3d at 414.

nicious effects of media concentration in the television market have *already* included: an overall reduction in locally-relevant content; a reduction in news coverage of local issues in the pre-election period; and a near-total dearth of local public affairs programming on most stations. The Communications Workers of America filed an extensive critique of the FCC's studies on media ownership.[31] Many other commenters echo our concerns regarding the effects of media concentration, and some identify adverse effects of consolidation in multiple media markets, adjacent television markets and in other media markets. *See, e.g.,* AWRT at 2 (radio and television); UCC at 77-81 (radio); SAG at 5-7 (television production); Creative Voices and Rintels & Napoli (broadcast indecency); NABOB (minority ownership); Mid-West (newspaper-broadcast cross ownership); IFTA (video production); Future of Music (radio employment); EPI (newspaper-broadcast cross ownership); Children Now and Children's Media (children's programming); CWA (radio, television and newspaper-broadcast cross ownership).

The Commission's past efforts to rely on a media marketplace unfettered by ownership limits as the means of delivering diversity, localism and competition to the American public have been an unmitigated disaster, as evidenced by the formal comments of nearly two dozen organizations and coalitions, collectively representing tens of millions of individual citizens.

> It has been the Commission's position that "competition is the most effective means of producing the marketplace results that best serve the public interest." *2002 Biennial Order*, 18 FCC Rcd at 13638, ¶ 55. Despite the Commission's hope that competition would bring out the best in diversity and localism, unfortunately, evidence submitted by Commenters and other supporters of the rules prove that the existence of diverse voices is almost non-existent and coverage of importance to local communities is abysmally low.

CCV et al. at 7.

[31] Democracy Unhinged: More Media Concentration Means Less Public Discourse (A Report by Dean Baker of the Department for Professional Employees, AFL-CIO, filed on behalf of the Communications Workers of America).

B. Current State of the Mass Media Market

As discussed in the preceding section, our initial comments and the accompanying *Compendium* provided extensive empirical evidence and analysis of the current, highly concentrated state of the mass media market. Attached to these Reply Comments and incorporated by this reference are recently completed studies of the current state of the media environment in the Hudson Valley in New York State (Reply Study 1) and in the State of Tennessee (Reply Study 2).

We selected the Hudson Valley as an example of the spread of concentration and consolidation from big media markets, such as New York City, into smaller surrounding areas. Most of the Hudson Valley falls within the New York DMA (television market) and much of it falls within the New York Arbitron (radio) market. Other counties in the Hudson Valley are included in the Albany media market (to the north). Our analysis of the Hudson Valley reveals the sparseness of its media environment. Typically, there is only one daily newspaper in the largest city in each county, at most one weekly newspaper and one or two local/regional radio stations which typically provide little in the way of local news and public affairs programming. Consolidation has reached the Hudson Valley, with about half the radio stations in the valley owned by one or the other of two national chains (Cumulus and Clear Channel). The quantity of news and public affairs programming in both radio and television has been reduced as the result of consolidation of ownership and operations. Clear Channel canceled a three-hour community public-affairs program on WGHQ-AM when it bought that station in Kingston, NY; and the only non-commercial TV station in the Valley (WRNN, also in Kingston, carried on all major cable systems) which recently relocated its headquarters outside the area, is refocusing its coverage on the tri-state area and no longer has any contact information listed for news staff within the Hudson Valley. Reply Study 1 concludes that, given the impact that current levels of consolidation have had on localism and diversity in the counties of the Hudson Valley, further relaxation of the media ownership limits would make an already unacceptable situation completely untenable.

Reply Study 2, authored by Mark Cooper, was presented by Gene Kimmelman of Consumers Union at the Commission's recent hearing in Nashville. The study examined the current state of the media market in three of the largest cities in Tennessee, including Nashville and Memphis (two of the top 50 markets in the U.S.) and Chattanooga. The cities were chosen as the largest city in the state, the smallest city in the state in which cross-ownership would be permitted under FCC rules, and the state capital. The study concluded that every individual medium in each of the cities is a highly concentrated, tight oligopoly, and that even when all media are combined into an overall media market, the media markets are concentrated, tight oligopolies in Nashville, Memphis and Chattanooga. The second half of the study examines the effect on concentration of ownership if the Commission permitted cross-media (newspaper-television) mergers. In the two larger markets (Nashville and Memphis) any cross-media merger involving the top two firms would increase concentration in excess of the Department of Justice and Federal Trade Commission *Merger Guidelines*. Because smaller markets have fewer media outlets and are more at risk, the outlook in Chattanooga is even worse.

Industry commenters paint a dramatically different picture of the current state of the mass media market. The NAB, for example, cites "numerous ownership proceedings during the past decade" in which the Commission, presumably relying on industry studies, determined that "combinatorial efficiencies [would be] derived from common ownership…, strengthen the competitive standing of combined stations…[and] enhance the *quality of viewpoint diversity*." NAB at 37. This statement only proves that the Commission's predictive judgment is not infallible. In our initial comments, we presented an overwhelming body of evidence and analysis to the contrary, showing that the industry, in the earlier stages of market-driven concentration and consolidation, has failed to deliver on its promises and has not improved the quality, increased the quantity or enhanced the diversity of local news and public affairs programming.[32]

1. Out of Market v. Local News and Information. The out-of market studies offered up by the NAB (10-12 and Attachments), show that to the extent this is an issue, it affects radio much more than television. These studies miss the fundamental point that dovetails with concerns about the production of local news and information. Out of market is likely to mean that the outlet is not broadcasting news and information that is directly relevant to the market in which the signal is being received.

2. Vertical Integration. As other commenters have noted,[33] and as demonstrated in greater detail in Reply Study 3, a handful of vertically integrated companies are already dominant in the production and distribution of entertainment programming via cable and satellite, as well as broadcast television and radio. It is important to understand the genesis and the consequences of this remarkable degree of concentration in the entertainment sector for two reasons. Entertainment programming is a part of the broader democratic discourse, and the history of vertical integration in the entertainment sector is a harbinger of similar events in the narrower realm of the production of news and information.

We begin Reply Study 3 with a discussion of the importance of diversity. The larger the number of sources competing to develop programming, the more wide-ranging and vibrant their ideas will be. Beginning in the 1970's and into the early 1990's, more than two dozen independently produced series were not only commercially successful but also served to broaden and enrich television. *All in the Family* and *The Cosby Show* are but two examples of groundbreaking,

[32] CU et al. at 15 and accompanying Studies.
[33] "Seven media giants and five broadcast networks control over 96% of the programs that carry commercial advertising during prime time." AFL-CIO at 10.

socially relevant entertainment programming that presented, in prime time and before a mass audience, portraits of family life that more accurately reflected the richness and diversity of America. The important policy point is not that these programs were critically acclaimed and commercially successful (although many were), but that the diversity of sources frequently resulted in programming that addressed controversial topics and presented non-stereotypical role models for the young.

Past policy decisions have resulted in a remarkable level of concentration in the video entertainment market. Once the Financial Interest and Syndication (Fin-Syn) rules were allowed to expire, every major broadcast network became co-owned with a major studio and production of programming for television was taken "in-house." This trend was strongly reinforced by the must carry/retransmission policies adopted in the early 1990s, which gave broadcasters the leverage to dominate the cable line-up. Reply Study 3 documents how the major broadcast networks were able to leverage their ownership of stations in the top twenty-five markets into control of both prime time and syndicated programming, and how these same vertically-integrated firms have used their marquee broadcast programming to launch national cable channels. The result is that vertically integrated firms with broadcast product and retransmission rights exert cross-platform dominance in general, national cable programming.

Reply Study 3 includes a discussion of the fundamental structure of the advertiser-supported television broadcast industry and the role that profit maximization plays within that structure. Market imperfections on both the supply and demand sides undermine the claim that broadcasters just provide consumers what they want to watch. The effects of vertical integration amplify these imperfections. So-called consumer demand for programming is, in reality, filtered through the lens of advertiser demand. On the supply side, the combination of quality and price of programming is filtered through the profit maximization potential of airing self-owned programming, including the prospects of repurposing, rerunning and cross-promoting.

Television and newspaper combinations have both vertical and horizontal aspects to them with respect to the production of news content. Newspaper-television combinations have the same economic incentives to sell "eyeballs" to advertisers as the entertainment conglomerates. They are also similarly motivated to maximize profits through repurposing, rerunning and repackaging the content they produce. The removal of structural constraints on vertical integration in the production of news and information may well result in the same outcome as has occurred in the entertainment space: an enormous negative effect on both quality and diversity.

3. Misleading Industry Market Analyses.

Both the television and newspaper and markets are already highly concentrated at the local level. As one commenter observes, citing a 2004 paper by CFA Research Director Mark Cooper, none of the 210 local TV markets are unconcentrated, only eight percent are moderately concentrated, while half are tight oligopolies and a quarter are duopolies. This is true even when using Designated Market Areas (DMAs) to define the geographic markets, which understates the degree of concentration.[34] Local news broadcasting is also highly concentrated: in 70 percent of the markets, original local news is available from only four (or fewer) broadcasters.[35]

Newspaper markets are even more highly concentrated. AFL-CIO and DPE report that, for all newspaper markets (both large and small), Cooper concluded that well over two-thirds are monopolies, another quarter are duopolies, and the fi-

[34] AFL-CIO and DPE at 12.
[35] *Id.*

nal one-tenth are tight oligopolies.[36] Cooper also concluded that the radio market, at the national level, is moderately concentrated when measured by listeners and revenues, but either loose oligopolies or tight oligopolies when viewed from the perspective of product types or formats. At the local level, concentration is even greater: half of all local radio markets are effectively duopolies and almost ten percent are monopolies.[37]

Given the high levels of concentration in the newspaper and broadcast markets, and in light of the demonstrated adverse effects that increased concentration has had on diversity, localism and competition, it is difficult to fathom why the Commission would want to continue to permit newspaper-television cross-ownership or relax the existing local ownership rules for broadcast stations. Nevertheless, industry commenters urge the Commission to do just that, and attempt to justify further relaxation of the rules by presenting a distorted picture of the relevant market. In the remainder of this section and the accompanying Reply Study 4, we address two major and misleading industry market analyses, those presented by Hearst-Sinclair and NAB.

a. Hearst's Misleading AMI Proposal.

Hearst, at 25-38, proposes a local television ownership rule which it claims "does not suffer the infirmities of the so-called Diversity Index"[38] adopted by the Commission in the 2002 Biennial Review and rejected by the *Prometheus* Court. Hearst describes its proposal as one that focuses purely on competition and diversity issues in the Delivered Video Programming

[36] *Id.* 12-13
[37] *Id.* at 13.
[38] Hearst at 27.

("DVP") market and does not resort to artificial assignments of value to various other media.[39] The audience share measure proposed by Hearst is the "Audience Market Index" or "AMI." Although Hearst's AMI approach may not suffer from the same flaws as the Commission's Diversity Index, it has its own serious flaw – one that dramatically underestimates the level of concentration that would result from a proposed merger.

In Reply Study 4, "Misleading Industry Market Analyses", at pages 1-5, we show that the AMI is ill-considered and represents both a failure of market definition and a failure to analyze the entire media market. Hearst defines the AMI as "the sum of the squares of the individual audience shares of all local television stations in the relevant DMA." Hearst at 28-29. In the example in Hearst's comments, there are five local TV stations in the DMA, with a total "audience" share of 42.25 percent. This leaves 57.75 percent of the audience "missing in action." If this is a television analysis, then the market should be defined as television viewers. The market structure must be based on the actual audience, not the theoretical audience of all households. If this is a cross-media analysis, then the index must take into account the actual usage of other media in that market. It is certainly a challenge to combine different media types, but the Commission's failure to do so in the *2002 Biennial Review Order* resulted in a remand by the Third Circuit. As Reply Study 4 shows, when the product market is properly defined, the markets are all concentrated and the hypothetical mergers considered by Hearst violate their proposed guidelines. The market is much more concentrated that Hearst's improperly defined market analysis suggests – with an HHI that is between three and six times higher. When corrected via either approach, the merger of the hypothetical second and third ranked stations would exceed the threshold of concern under the *Horizontal Merger Guidelines* used by the Department of Justice and the Federal Trade Commission.

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[39] *Id.*

b. NAB's Misleading Market Analysis.

As we explain in the second section of Reply Study 4, NAB's Attachment A, entitled "Media Outlets Availability by Markets" dramatically overstates the voice counts for radio. Rather than use the Arbitron area, the NAB begins with a count of radio stations in the far larger Designated Market Area (DMA), an area far too large for radio. The NAB does not provide the number of owners of radio stations in the Arbitron area, which is the policy relevant count. Exhibit 1 to Reply Study 4 shows the dramatic difference in voice counts for radio. The count of independent voices – the number of owners in the Arbitron area -- is less than one fifth the number of stations in the DMA. There is an average of 14 owners per Arbitron area compared to 81 stations per DMA. The first study dramatically misrepresents the diversity of voices available to listeners and the error is not corrected in their comments.

The NAB also fails to consider market share data. As shown in Exhibit 2 to our Reply Study 4, there are on average fourteen owners per Arbitron area, but the top two owners have an average market share of approximately two-thirds of the market. The top four owners have about 90 percent of the market. Even in the least concentrated market, San Francisco, the top two owners have a market share of 46 percent and the top four have a market share of 75 percent.

In summary, while NAB's first study depicts a radio market characterized by great diversity, a far different picture emerges when the market is examined more closely. When we use the appropriate geographic market (Arbitron area), focus on the relevant policy variable (ownership), and take account of the key market structural characteristics (audience), we find that even the radio market is a very tight oligopoly. Instead of an average of 81 stations, we find four owners with a 90 percent market share.

c. The Commission Is Legally Obligated to Reject the NAB and Hearst Analyses.

The above discussion shows why the industry analyses are empirically flawed and should not be relied upon by the Commission. Wholly apart from the flawed market analyses, there is a separate, but very important, reason that the Commission must not take the approaches recommended by the industry commenters. Underlying the NAB analysis is a fundamentally incorrect conception of what the Commission should do in assessing the market structure of the broadcast industry for purposes of its First Amendment policy. The NAB, like most of the industry commenters, urge the Commission to base its decision purely on the availability of outlets, without giving any consideration or weight to the audiences served by those outlets. Given the importance of this issue, we address it in a separate section, which follows.

C. Audiences

1. The Necessity of Counting Audiences. In our initial comments, at *Compendium* Studies 20 and 21, we summarized the *Prometheus* Court's critique of the Commission's Cross-Media Limits and Diversity Index and presented an alternative, reasonable measure of market structure that responded to the principal criticisms leveled by the *Prometheus* Court.[40] We stressed the importance of developing a measurement standard ("ruler") that accounts for the differing importance and reach of the media voices in a given market and assigns appropriate weights to each media voice. Once such a ruler has been developed, the Commission must then develop rules that rationally relate to that standard of measurement. Finally, it must be prepared to demonstrate that the lines drawn within the ownership rules are not arbitrary, but can instead be consistently applied across different markets and different media combinations.

[40] "In converting the HHI to a measure for diversity in local markets…the Commission gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results. For these reasons…we remand for the Commission to justify or modify further its Cross-Media Limits." *Prometheus Radio Project,* 373 F. 3d at 403.

The Commission's review of media ownership rules necessarily entails both market definition and assigning the appropriate weights to various media outlets. In *Compendium* Studies 21 and 22, we outlined a defensible and rational approach to measuring geographic markets and product markets, and of describing market structure. We found that the single most important factor in defining a local media market is the size of the audience reached by each of the media outlets.

Our review of the initial comments filed by industry parties reveals a near-total absence of thoughtful empirical analysis of this issue. The NAB, for example, has taken an internally inconsistent position on whether audiences should be counted. Audiences should be counted if the count favors the industry position.[41] Otherwise the Commission is urged to focus exclusively on voices, not on audiences.[42]

The industry commenters do not want the Commission to take the audience of the outlets into account when examining the market structure.

> It is the availability of content from multiple outlets that matters – not that some ideas, viewpoint or content may be more or less popular than other content at any particular time.[43]
>
> As the Commission itself explained in its *2002 Biennial Review Order,* "viewpoint diversity refers to the *availability* of media content reflecting a variety of perspectives.[44]
>
> In other words, it matters not if one voice speaks "louder" than another for purposes of assessing the diversity of viewpoints available in a local community – it

[41] *See, e.g.,* NAB at v: "estimated monthly audiences for Internet radio are over 52 million" and NAB at 15: "The weekly Internet radio audience has increased 50% in the past year alone, and 21% of Americans ages 12 and older have listened to Internet radio in the past month." These "scary big number" statistics are presented without context, and the reader is provided no basis of comparison between the monthly audience figure quoted for Internet radio and the alternative means of audio program delivery – terrestrial, cable and satellite radio. In a similar vein, NAB does not indicate what percentage of those who have listened to Internet radio are listening primarily or exclusively to their favorite local radio stations via a broadband connection where over-the-air reception is either unavailable or less convenient..

[42] For example, NAB cites increasing broadband access and platforms such as blogs, podcasts and YouTube (NAB at 12) as evidence that consumers have ready access to "the virtually unlimited voices available via the Internet." Id at 35.

[43] NAB at 54. See also NAA, 89-92.

[44] Gannett, p. 32.

> matters only that different voices have the means through which to speak, and can be heard by any who choose to listen.[45]

While the industry commenters repeatedly cite the *Prometheus* Court's ruling for support, they tell the Commission to ignore the most fundamental premise of that Court's decision: the Commission erred when it focused solely on outlets and ignored the audiences of those outlets. It was the failure to take audiences into account that led to the most damning criticism lodged by the Third Circuit against the Commission's rule – that the assignment of equal market shares to all outlets within a media type generated absurd results, such as the assignment of equal 4.3% market shares to the television stations of Dutchess Community College and ABC in the New York City DMA.[46]

The industry commenters would have the Commission ignore the clear conclusion of the *Prometheus* Court that the audience matters and the Supreme Court's understanding that "undue economic concentration" and "excessive impact on public opinion" are the core of the issue. The argument that all outlets are equal and that audience does not matter is antithetical to the fundamental Supreme Court jurisprudence.

The industry tells the Commission to abandon rigorous empirical analysis of media markets based on a legal theory that the Supreme Court has repeatedly rejected. They want the Commission give up the effort to realistically measure the voices in the media markets on the grounds that the mere availability of outlets, regardless of their size or impact, is all the matters. Simply counting outlets, and ignoring their actual audiences and impact on the public, would be no less arbitrary and capricious than assigning equal weights to all outlets of a given type, as the Commission did in adopting the now-discredited Diversity Index. Industry commenters urge the

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[45] Id., p. 33.
[46] *Prometheus Radio Project*, 373 F.3d at 408.

Commission to reject Congressionally-mandated goals for media policy, including localism, even though the courts have repeatedly and consistently upheld these goals as legitimate governmental purposes. The Commission should reject the industry arguments on Constitutional, legal and evidentiary grounds.

2. Counting vs. Discounting. The industry commenters repeatedly confuse counting with discounting. Outlets should be counted and their audience is a reasonable measure of the weight they should bear in a real world assessment of the media marketplace. Less popular sources occasionally play an important role and this is correctly reflected in counting their weight in influencing public opinion.

> Indeed, it would be antithetical to our First Amendment values for a government agency to suggest that outlets offering less "mainstream" content should not count at all, or should be discounted substantially, in any media diversity analysis.[47]
>
> By analyzing diversity based on audience reach or market share instead of availability, the Commission would improperly discount the critical role that less popular media outlets often perform in local markets."[48]

A careful assessment of the importance, influence and reach of all media voices is necessary in order to avoid the pitfall of reaching an arbitrary and capricious result in either direction. In our initial comments, we suggested an alternative approach that would assign appropriate market shares to all media outlets. Our recommended approach would not ignore, improperly discount or give undue weight to any media outlet based on content. The industry commenters, virtually without exception, urge the Commission to once again sidestep this reasoned analysis. They urge the Commission to, once again, ignore actual usage patterns and measures of reach and influence and just declare that there are sufficient voices available to meet its statutory and constitutional obligation to promote the "widest possible dissemination of information from di-

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[47] NAB, p. 55
[48] Gannett, p. 33.

verse and antagonistic sources," and to prevent "undue concentration of economic power" and inordinate effect on public opinion."

The preceding discussion leaves no room for doubt that the same industry commenters who urge the Commission to disregard audiences and look only at the number of available outlets are themselves preoccupied with audiences and market shares. They even cite the size of their own and their competitors' audiences in their comments when such statistics are useful in supporting their preferred policy outcome. They present the market share of the top five radio stations in the top 100 markets, but conveniently refrain from presenting the market share of the top owners in those markets. Industry commenters freely provide estimates of how much market share they have lost to alternative media and to out-of-market broadcasters, but tell the commission not to count market shares in evaluating market structure.

The Commission must deal with the fundamental inconsistency of the industry's position. As the *Prometheus* Court held, disregarding the relative importance of individual outlets within the community and assigning equal weights to all media outlets of a given type did not pass the rational basis test. Industry commenters press their case for regulatory relief by selectively presenting audience statistics of their alleged rivals. Yet in virtually the same breath, they tell the Commission to focus on the availability of the virtually limitless number of websites, blogs and independent local news sites and ignore the near-total domination of local markets by traditional media outlets. Allowing the industry to "have it both ways" can only lead the Commission to the make a decision that, like its three previous attempts to revise media ownership limits, would fail to pass judicial review.

III. RESPONSE TO INDUSTRY CLAIMS

A. Misleading Claims that the Television Industry is in Dire Financial Straits

In our initial comments, we showed that television stations, even in smaller markets, are selling at healthy prices.[49] Yet broadcast industry commenters claim that the industry is in dire financial straits, in need of regulatory relief. How can these conflicting portrayals of the industry's financial status be reconciled? The answer is to be found in the attached Reply Study 5 entitled "Out of Focus: The NAB's Fraudulent Financial Analysis."

NAB reports revenue data based on a survey of its members, but chose to analyze on the odd-numbered years 1999, 2001, and 2003. The NAB analysis omits revenue data for all recent years in which either a national election or the Summer Olympics took place. The absurdity of this approach is obvious. National elections in particular are not random and unpredictable events. They occur on a regular cycle, every two years, and result in a significant increase in broadcast advertising revenues every time. For example, Media General's 2005 Annual Report indicates that political advertising as a percentage of total broadcast time sales is on the order of eight to twelve percent in election years, but only between one and four percent in the odd-numbered years included in the NAB study. In Reply Study 5, we reviewed the annual financial reports of ten publicly traded broadcast station owners, excluding the owners of the big four national networks, for each of the years from 2000 through 2005. The analysis showed that these ten companies' stations, in the aggregate, earned <u>thirty percent more in the even-numbered (election) years than in the odd-numbered years included in NAB's analysis.</u>

A second financial analysis presented by the NAB shows that audiences in larger markets are more valuable than audiences in smaller markets. While this is certainly true, NAB's analysis

[49] As noted earlier in these reply comments, AWRT at 5-6 has commented that one of the side effects of media consolidation has been to drive prices for broadcast properties in general – not just television stations – beyond the reach of new entrants, precluding more women from becoming station owners.

ignores the fact that costs of doing business in larger markets are high, whereas the lower costs for land/rent, labor and electricity in smaller markets tend to offset the difference in audience value. The comparison is shown in Reply Study 5 at pages 5-7.

As stated in the conclusion to Reply Study 5, and as referenced elsewhere in these reply comments, the recently announced sale of the New York Times Company's nine television stations to a private equity firm for approximately 14 times cash flow is only the latest indication that financial markets consider television stations to be attractive investments. This, along with the other recent sales of television properties referenced in our initial comments, provides ample evidence that the television industry is alive and well, and that the NAB's claims of poverty are simply untrue.[50]

B. Unsupported Assertions that Repealing Specific Rules Will Benefit the Public

A number of industry commenters claim that consolidation produces, and is likely to continue to produce, consumer benefits. Many of the claims are variations on the "dire financial straits" arguments advanced by NAB and refuted in the preceding section, without any direct assertion that the purported synergies will benefit consumers rather than station owners. For instance, Granite Broadcasting argues that if duopoly rules were relaxed, the total operating costs of the two stations would be reduced while still providing two revenue streams, allowing smaller stations to "leverage the operational efficiencies necessary for their survival."[51]

In Reply Study 6, we review two industry commenters' claims that consolidation of television outlets and the creation of newspaper-television combinations in the same market yield consumer benefits, such as increases in local news programming. The first commenter, Media

[50] Newspapers are also continuing to attract investors. Frank Ahrens, "Newspaper Ownership Is Turning The Page," *Washington Post*, January 16, 2007, D-1: "Though they are not growing, many newspapers continue to make healthy profits, making them appealing targets for equity firms…."
[51] Granite at 7.

General, matched pairs of stations where such combinations existed with stations in other markets not in combinations. This inter-market comparison analysis is fundamentally flawed and does not support Media General's claims. The author of Reply Study 6 identified four separate flaws in Media General's analysis. When the analysis is adjusted to account for these flaws, the result is directly contrary to Media General's claim that television stations in combination markets produce more local news. In fact, we find that non-combination market stations are likely to have between ten and twenty-five percent more total news hours.

In the second section of Reply Study 6, we examine Tribune's "before-and-after" data for television stations and newspapers, some of which are in newspaper-television combinations and some which are not. The data presented on TV ratings and news hours, as well as newspaper circulation in the five markets where Tribune owns a newspaper-television combination, fails to demonstrate the benefit of combinations. We conclude, among other things, that the increase in the number of news hours at combination television stations was offset by a reduction in circulation of newspapers in combinations, with the net effect that there was a statistically significant decline in the total output of news from the combinations.

C .The Internet and New Media Have NOT "Changed Everything"

In this section of our reply comments, we address three claims frequently made by industry commenters in an effort to justify elimination of rules limiting ownership of broadcast licenses. The first such claim is that viewers have access to previously unavailable sources of news, chiefly local cable news channels, which make positive contributions to both source diversity and viewpoint diversity. The second is that the rise of the Internet, and the virtually unlimited sources of information available online, make broadcast ownership limits unnecessary. The third claim is a combination of the other two: city-specific websites, including Backfence and

Gothamist, have been cited by commenters (including Media General[52] and the NAA[53]) as providers of local news and information, in support of claims that current media ownership limits are too restrictive.

1. Local Cable News. Reply Study 7, by Adam Lynn, Mark Cooper & S. Derek Turner, examines the issue of whether the more than one hundred regional cable-only networks cited in the comments of media industry companies serve as significant sources of local news and information. The authors determined that few of these cable-only networks provide local news programming, and those that do carry local news are far too limited in terms of staffing levels and geographic coverage to have had any significant impact on the landscape of local news, much less serve as justification for abandoning media ownership limits in local markets.

Nearly one-third (39 of 119) of the regional cable networks are sports networks, with no local news reporting. Nearly half of the regional cable-only stations that do air local news are owned by a traditional local news outlet, such as a broadcast television station or a daily newspaper. Of the 31 independent regional cable-only stations that air local news reporting, 12 (or nearly 40 percent) are based in the New York City television market. Nearly all of the 31 independent regional cable-only stations that air local news reporting have operating and cross-promotional relationships with traditional local news operations.

A comparison of the staffing levels of these cable-only news operations with those of traditional media outlets reveals that the resources these cable news operations devote to reporting local news are minimal, representing an addition to the local resource pool (newsroom staff) of less than three percent in the regions they serve. Moreover, because these stations serve only

[52] Media General at 54.
[53] NAA at 62.

about one-fifth of the population, on a national basis they represent an addition to the local news resource base of approximately one-half of one percent.

2. Media Usage and Substitutability. In Reply Study 8, Mark Cooper examines the claims of industry commenters that the rise of the Internet provides a major justification for the elimination of the Commission's broadcast ownership rules. Most of the industry commenters place heavy reliance on data generated by the Pew Center. However, as demonstrated in Reply Study 8, most of the industry commenters have reached conclusions that are not supported by the Pew data, and in many instances, industry commenters' conclusions are directly contradicted by Pew Center's own analysis. The Pew data and the conclusions of the Pew Center, confirmed by data from other sources (including surveys from Gallup and Harris Interactive), all show that traditional media – primarily television and daily newspapers -- remain the dominant source of news and information, and that the Internet has caused only minor changes, not the substantial decline in the use of traditional news media that industry commenters frequently claim.

Although there has been a decline in the use of traditional news media, the Pew data indicate that the decline occurred in the 1990's, well before the Internet and online news outlets became widely available. Pew data also shows that online users treat Internet news sources as supplements to traditional media, not as substitutes for traditional media.

Industry commenters cite low and declining news consumption by the young as evidence of the Internet's transformative effect on the media marketplace. However, the Pew data over a 12-year period suggests that this phenomenon is merely a characteristic of youth, and not a new development caused by the Internet. Tracking age cohorts, the data shows that as the young age, they spend more time consuming news. Also, youth news consumption has increased since 2002. While some of this increase is attributed to the Internet, the data indicate that traditional sources (operating in both physical space and cyberspace) are the primary beneficiaries of this increase. The overwhelming majority of online news outlets are not independent sources of news, but are either directly owned by traditional media firms or rely heavily on news produced by traditional sources.

Only about 10 percent of the web audience visits independent Internet news outlets. Our accompanying study (Reply Study 9) on these websites shows that these sites contain very little independent news content, relying heavily on news produced by traditional sources.

3. Local News Websites. The Newspaper Association of America cited a dozen city-specific local websites operated by non-traditional media outlets as evidence for the need for relaxation of the Commission's media ownership limits. Just two days ago, the *Washington Post* reported that Backfence, a company formed to create community news sites (and cited in the comments of both the NAA and Media General, had "lost three executives, including its co-founder, and is struggling to reinvent its business model to stay afloat.[54] The influence of these city-specific local websites can be assessed by reviewing information on their content, traffic and audience composition, and by comparing these sites to the websites of local television stations and daily newspapers in the same markets.

Reply Study 9 represents our assessment of sixteen different city-specific websites, including the twelve referenced by NAA. The sixteen websites operate in a total of 15 media markets (11 DMAs and four sub-markets). We found that the city-specific websites cited by NAA do not publish appreciable amounts of original local news content. On average, only one story in five published on the city-specific sites identified by NAA was based on original reporting, but more than half of these stories were on subjects dealing with arts, entertainment or food. Only 2.6 percent of the stories from the city-specific sites contained original reporting on "hard news"

[54] Kim Hart, "For Local News Site, Model Just Didn't Click," *Washington Post*, January 15, D-1.

topics. The balance of the news on city-specific websites relied on original reporting by traditional local news outlets, such as daily newspapers or broadcast television stations.

Another measure of the impact of these city-specific websites is the size of their audiences. These websites typically had very small audiences. The median number of unique visitors in a single month to the city-specific websites was just 5,000. The median number of unique monthly visitors to the websites of the local newspapers in the same markets is over 100 times as large. Furthermore, the physical space presence of the traditional media outlets would make their viewership almost two thousand times as large.

The audiences of the city-specific websites are very transient. Only 8 percent of the visitors to the city-specific websites viewed the site between 2 and 30 times in a month. The visitors to the websites of local newspapers demonstrated substantially greater loyalty: 28 percent of the visitors to the websites of local newspapers were frequent users, viewing the sites between 2 and 30 times in a month.

Reply Study 9 reinforces what we said in our initial comments: "Only a very small percentage of the population…regards the Internet as a frequently used source of local news and information. Even those who rely on the Internet for local news overwhelmingly go to web sites of traditional media – local newspapers, local TV and national TV – which generally utilize "repurposed" content substantially identical to their traditional distribution formats." CU et al. at 11. Although the Internet provides another medium for the dissemination of local news, it has yet to actually compete with, or diminish the influence of the traditional newspaper and broadcast news outlets. Thus, the presence of these city-specific local websites does not provide a compelling reason to remove important ownership protections that maintain citizens' access to vibrant and diverse local news media.

D. Past Relaxation of Media Ownership Limits Has Already Caused Demonstrable Harm; Further "Reform" Will Only Exacerbate the Problems

In Section III.A. of these reply comments, we refute the industry commenters' laments that the wholesale elimination of existing media ownership limits is necessary to ensure the very survival of broadcast stations and daily newspapers. In Section III.B, we debunk the industry's claims that repeal of ownership limits will provide benefits to the public. In Section III. C., we show that the industry has vastly overstated the current impact of the Internet and other new media technologies as sources of news and opinion reflecting diverse viewpoints.

In this final section, we provide a brief overview of some of the initial comments filed by other parties on the issue of harm to the public interest, in response to industry commenters' claims that regulatory intervention, in the form of limits on media ownership, are no longer necessary to ensure diversity and localism.[55] Numerous commenters have outlined and documented the dramatic decline in diversity of ownership, and the attendant reductions in source diversity, viewpoint diversity and localism since the latter half of the 1990's and the prospects for further harm if the rules adopted in the most recent rulemaking were implemented without alteration.[56] In the words of AWRT:

> Many of the rules adopted by the Commission in the *2002 Biennial Review Order* would permit greater ownership concentration among large media owners. AWRT firmly believes that permitting greater concentration of ownership in the radio and television industry disserves the American public by reducing diversity – diversity of ownership, diversity of programming and diversity of viewpoints

AWRT at 1.

Much of the evidence of the adverse effects of media concentration has been placed in the record in this proceeding by a wide range of commenters. The harmful effects of media concentration on participants in the video production, film and music industries have been the sub-

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[55] *See, e.g.*, Fox at ii. 2-3, 18, 26, Media General at 3-4, Hearst at 22.

[56] UCC at 4-5, CWA at iii-iv, 8-9 and AFL-CIO at 17-22.

ject of testimony presented by numerous witnesses at the Commission's public hearings in the Los Angeles and Nashville areas. We fully expect that additional evidence of the recent precipitous decline of localism and diversity will be presented at future public hearings, in the reply comment round and in future *ex parte* presentations. We predict that there will be a truly massive record before the Commission when the media ownership rules come up for a vote, and that the overwhelming weight of the evidence and opinion will be in favor of reasonable limits on media ownership.

1. Localism. The acquisition of Telemundo by NBC resulted in the closure of Telemundo local news bureaus in five areas with large Hispanic populations.[57] These were replaced by one national center for the production of Spanish-language news in Dallas.[58] In other cities, Telemundo's operations were moved into facilities with local NBC television stations and cable networks.[59] Commercial broadcasters are focused on maximizing profits rather than serving the local communities to which they are licensed.[60] Consolidation, rather than leading to increased consumer choice and an enlightened citizenry, impels group owners to save costs by sharing personnel and content among commonly-owned stations, wherever located, and to emphasize national news and entertainment programming rather than locally-produced programs that meet the needs and interests of the residents of the stations' communities of license.[61]

2. Viewpoint Diversity. Local audiences are deprived of independent editorial voices when two or three local English-language stations come under common ownership.[62] An exam-

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[57] The local news bureaus closed in 2006 were in San Jose, Phoenix, Houston, San Antonio, Dallas and Denver. AFTRA at 24.
[58] *Id.*
[59] *Id.*
[60] CCV at 9.
[61] CCV at 9-10.
[62] AFTRA at 14-15 notes that local audiences are deprived of diverse editorial perspectives in the news where duopolies or triopolies are created. The owner will broadcast the same local content over all of the stations with little

ple, cited in the comments of AFTRA at p. 14, is the Champaign/Springfield television duopoly owned by Nexstar Broadcasting. The local news content on the two stations is virtually identical, with the same on-air staff. Only the branding is different.

A loss of an independent local editorial voice is also likely to occur when a television station is commonly owned with a daily newspaper or a group of radio stations. The television station can, and probably will, summarize and reformat the paper's content, offering no benefit to the consumer. Owners of same-market television and radio properties may assign the television reporters to file stories for the co-owned radio stations,[63] and the owners of newspaper-television combinations equip newspaper reporters with video cameras. The result is homogenized content, delivered via multiple commonly-owned outlets, with a common editorial viewpoint.[64] The public, which typically has access to only one or two local daily newspapers and three or four local television newscasts,[65] sustains a reduction in availability of diverse editorial viewpoints, the newspaper/television or television/radio combination realizes cost savings and the likelihood that its views will dominate the local political and cultural discourse increase.[66]

3. Ownership Diversity. Since the relaxation of the broadcast ownership rules, the number of entities owning radio and television stations has declined, even though the number of stations has grown.[67] Since 1998, there has been a 30% decrease in the number of Black-owned television stations, even though the number of stations increased over the same period.[68] The percentage of media owners who are members of minority groups is drastically lower than the

variation. Although this reduces the broadcaster's costs, it runs contrary to the Commission's goal of promoting competition and viewpoint diversity.

[63] AFTRA at 22-23.

[64] AFL-CIO at 19 cites examples of how cross-ownership has unduly influence reporting, as well as examples from journalist Ben Bagdikian of self-censorship by editors and journalists in local markets.

[65] AFL-CIO at 53-54.

[66] EPI at 3, describing this as an example of synergies that are not in the public interest.

[67] AFL-CIO at 53-54.

[68] UCC at 8.

percentage of minorities in the total population. Concentrated ownership of radio stations undermines both localism and diversity. It has resulted in the elimination of unique radio formats on the grounds that they are less commercially viable. Ownership concentration has fostered the homogenization of content through the use of national or regional playlists, greatly reducing the chances that artists' songs will be aired on local stations.[69] These and other cost-saving practices such as voice tracking have prompted listener dissatisfaction with radio.[70]

Research has demonstrated a strong positive correlation between minority ownership and the likelihood that a station will air political or current events shows other than news.[71] Minority-owned radio stations spend more time broadcasting public affairs or events of greater concern to ethnic and racial minority audiences, and were more likely to provide coverage on issues concerning women and health.[72]

According to a study by the National Urban League, minorities and women are underrepresented on the highly influential Sunday morning network programming.[73] The National Association of Hispanic Journalists found that Latinos are underrepresented on the network news and that coverage tends to be negative and one-sided.[74] Minorities are also underrepresented or stereotyped in entertainment programming.[75] The lack of minority-owned media may have far-reaching effects on minority participation in democratic society: a recent study showed that the availability of a Spanish-language television station could have raised Hispanic voter turnout from 46% to 54% in presidential election years and from 30% to 41% in non-presidential elec-

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[69] AFTRA at 18.
[70] AFL-CIO at 35-36 and 48
[71] UCC at 17.
[72] UCC at 16.
[73] UCC at 9.
[74] UCC at 10.
[75] UCC at 13.

tion years.[76]

Given the industry track record, there is certainly no reason to believe that further relaxation of media ownership limits would lead to improvements in localism or diversity. To the contrary, further consolidation would tend to squeeze out the remaining minority- and women-owned outlets, leaving the industry in the hands of owners and managers narrowly focused on the bottom line and attracting the largest possible audience with the demographic characteristics that advertisers value most highly. In this quest for the advertising dollar, commercial broadcasters would likely continue to fail miserably in coverage of issues relevant to the civil rights community, women and racial and ethnic minorities. Marketplace-oriented commercial broadcasters are highly unlikely to promote an informed and involved citizenry.[77]

CONCLUSION

In these reply comments, we have shown that the industry commenters have overstated the case that the Commission's media ownership rules are unconstitutional, and that they have construed Section 202(h) as creating a presumption in favor of repeal, where no such presumption exists. In these reply comments and the accompanying Appendix B *Compendium of Reply Studies* we have addressed and refuted the four principal contentions advanced by the industry in initial comments. First, we have shown that the industry commenters have exaggerated the extent to which they need regulatory relief to assure their continued financial viability. Second, we have shown that the industry commenters have overstated the extent of competition they currently face from the Internet, ubiquitous broadband, mobile video and other new technologies. Third, we have shown that industry commenters' assertions that consumers will derive benefits from further industry consolidation are without merit. Lastly, we have shown, through citations to the

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[76] UCC at 22.
[77] *See* CCV at 10.

initial comments of other parties, that media consolidation has already led to demonstrable harms to localism, viewpoint diversity and ownership diversity, and that additional serious harm would likely result if the Commission repeals or substantially relaxes its media ownership rules. We urge the Commission to take our views into account as it continues its deliberation in this important proceeding.

Respectfully submitted,

By: /s/_____________________________

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Appendix A: Abbreviated Citations to Initial Comments

Unless otherwise indicated, references are to comments dated October 23, 2006 filed in one or more of the following dockets: MB Docket Nos. 06-121 and 02-277, MM Docket Nos. 01-235, 01-317 and 00-244.

AFL-CIO and DPE: Comments of the American Federation of Labor and Congress of Industrial Organizations and the Department for Professional Employees, AFL-CIO

AFTRA: Comments of the American Federation of Television and Radio Artists, AFL-CIO

Amherst: Written Comments of the Amherst Alliance

Amherst Supp.: Supplemental Written Comments of the Amherst Alliance

Arso: Comments of Arso Radio Corporation

AWRT: Comments of American Women in Radio and Television, Inc.

Baker: Democracy Unhinged: More Media Concentration Means Less Public Discourse (A Report by Dean Baker of the Department for Professional Employees, AFL-CIO, filed on behalf of the Communications Workers of America)

Bonneville: Comments of Bonneville International Corporation

CBS: Comments of CBS Corporation

CCC: Comments of the Center for the Creative Community Regarding Competition and Media Concentration in the Television Industry

CCV et al.: Comments of Center for Creative Voices in Media, Center for Digital Democracy, CCTV Center for Media and Democracy, Common Cause, Media Alliance, National Hispanic Media Coalition, New America Foundation, Prometheus Radio Project and U.S. Public Interest Research Groups

CU et al.: Comments of Consumers Union, Consumer Federation of America and Free Press

Children Now: Big Media, Little Kids: Media Consolidation & Children's Television Programming (A report by Children Now, dated May 21, 2003, filed with Comments of The Children's Media Policy Coalition).

Children's Media: Comments of The Children's Media Policy Coalition

Creative Voices: Comments of the Center for Creative Voices in Media

CWA: Comments of Communications Workers of America, The Newspaper Guild/CWA and

National Association of Broadcast Employees and Technicians/CWA

CWA Professionals Survey: Media Professionals and Their Industry (A report by Lauer Research Inc. filed by the Communications Workers of America)

DCS: Initial Comments of the Diversity and Competition Supporters (A coalition of 29 national organizations, including the Minority Media and Telecommunications Council)

Disney: Comments of The Walt Disney Company

EPI: The FCC's Newspaper-Broadcast Cross-Ownership Rule: An Analysis (A report by Douglas Gomery, filed on behalf of the Communications Workers of America)

Equity: Comments of Equity Communications, L.P.

FMC/AFM: Comments of Future of Music Coalition and American Federation of Musicians

Fox: Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc.

Future of Music: Employment and Wage Effects of Radio Consolidation (A report by Peter DiCola, dated August 9, 2006, filed on behalf of the Communications Workers of America)

Galaxy: Comments of Galaxy Communications, L.P.

Gannett: Comments of Gannett Co., Inc.

Granite: Comments of Granite Broadcasting Corporation

Gray: Comments of Gray Television, Inc.

Hearst: Comments of Hearst-Argyle Television, Inc.

Hearst Decl.: Joint Declaration of Luke Froeb et al. in Support of Comments of Hearst-Argyle Television, Inc.

Hoak: Comments of Hoak Media LLC

IFTA: Comments of the Independent Film & Television Alliance

ION: Comments of ION Media Networks

IWPR: Making the Right Call: Jobs and Diversity in the Communications and Media Sector (A report, dated 2006, by Vicky Lovell et al. of the Institute for Women's Policy Research and filed by the Communications Workers of America)

KTBS: Comments of KTBS, Inc.

KVMD: Comments of KVMD Licensee Co., Inc.

Main Street: Comments of Main Street Broadcasting Company Incorporated

Media General: Comments of Media General, Inc.

Mid-West: Comments of the Mid-West Family Stations

Monterey: Comments of Monterey Licenses, LLC

Morris: Comments of Morris Communications Company, LLC

Mt. Wilson: Comments of Mt. Wilson FM Broadcasters, Inc.

Multicultural: Comments of Multicultural Radio Broadcasting, Inc.

NAA: Comments of the Newspaper Association of America

NAB: Comments of the National Association of Broadcasters

NABOB: Comments of the National Association of Black Owned Broadcasters, Inc. and the Rainbow/PUSH Coalition, Inc.

NAHJ: Comments of the National Association of Hispanic Journalists

NAHJ Brownout Report: Network Brownout Report: The Portrayal of Latinos and Latino Issues on Network Television News, 2005 (A report by Daniela Montalvo and Joseph Torres filed by the National Association of Hispanic Journalists)

NAHJ Magazine Report: U.S. News Magazine Coverage of Latinos: 2006 Report (A report by Dina Gavrilos, dated June 2006, and filed by the National Association of Hispanic Journalists.

NAHPF: Comments of the National Association of Hispanic Publications Foundation

Napoli: Comments of the Donald McGannon Communications Research Center dated October 22, 2006.

Nexstar: Comments of Nexstar Broadcasting, Inc.

Pew Journalists: How Journalists See Journalists in 2004: Views on Profits, Performance and Politics (A report by Andrew Kohut of the Pew Research Center for the People and the Press, filed by the Communications Workers of America)

PFF: Comments of Adam Thierer, Senior Fellow with the Progress & Freedom Foundation (“PFF”) and the Director of PFF’s Center for Digital Media Freedom

Prometheus: Comments of Prometheus Radio Project

RAC: Comments of the Recording Artists' Coalition

Rintels and Napoli: Ownership Concentration and Indecency in Broadcasting: Is There a Link? (A report dated September 2005 by Jonathan Rintels and Philip M. Napoli, filed on behalf of the Center for Creative Voices in Media)

SAG et al: Comments of Screen Actors Guild, the Directors Guild of America, the Producers Guild of America and American Federation of Television and Radio Artists, AFL-CIO

Sinclair: Comments of Sinclair Broadcast Group, Inc. on Further Notice of Proposed Rule Making

Smaller Mkt. TV: Comments of Smaller Market Television Stations

Spanish B/C: Spanish Broadcasting System, Inc. Comments on Media Ownership

Suddenlink: Comments of Cequel Communications, LLC D/B/A Suddenlink Communications

Times-Shamrock: Comments of Shamrock Communications Inc. and The Scranton Times, L.P.

Tribune: Comments of Tribune Company on Further Notice of Proposed Rulemaking

UCC: Comments of Office of Communication of United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause and Benton Foundation

United: Comments of United Communications Corporation

Univision: Comments of Univision Communications Inc.